

THE ROLE OF TRIAL IN PROMOTING COOPERATIVE NEGOTIATION IN CRIMINAL PRACTICE

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I. INTRODUCTION

This essay starts with a simple syllogism based on three facts.

Fact one: Trials are adversarial.

The western paradigm of law is based on adversarial competition, beginning with accusatory pleadings,¹ progressing through strategic discovery² and motions,³ and culminating in trial, the distillation of binary decision making in the legal system.⁴ Trials are associated with a breakdown in the negotiation process⁵—either the parties were unable

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1. See Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 728, 737 (2005).

2. See, e.g., Robert L. Ferguson, Jr., *Use and Abuse of Discovery*, MD. B.J., July–Aug. 2004, at 26, 29–31 (discussing the guidelines and ethics surrounding the strategic use of various discovery mechanisms). Several authors believe that discovery in criminal cases is not contentious enough. See, e.g., Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 549, 553; Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1103–04 (2004).

3. Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389, 391 (2004–2005) (“The duty of zealous advocacy deteriorates into excesses of adversarial zeal such as discovery abuse, forum shopping, [and] the filing of frivolous pleadings and motions . . .”). Professor Carrie Menkel-Meadow describes the U.S. method of litigation, including “discovery, motions, and other adversarial practices” as “choking” the European system of law. Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 340.

4. “The culmination of the adversarial process is, of course, a trial . . .” Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 50 n.99 (1991).

5. Many commentators believe that settlement is economically preferable to trial. See, e.g., Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225 (1982) (“[T]rial . . . represents a bargaining

to find a deal that they thought left them better off than their expectations about the value of trial, or they did not try to negotiate at all. In either case, the need for a trial represents a triumph of adversarial dispute resolution over collaborative deal-making. To the extent that trials are adversarial, it is reasonable to assume that negotiations in cases that culminate in trial are adversarial as well.

Fact Two: Criminal trials are frequent and common.

Criminal cases are much more likely, on a percentage basis, to go to trial than other cases.⁶ “Of the 20,433 trials conducted in federal district courts in 1990, 8,931 were criminal cases. The disproportion occurs because criminal filings accounted for only 18.3% of the caseload.”⁷ When state trials are considered, there is reason to believe that the actual number of criminal trials is higher as well.⁸

Fact Three: Adversarial lawyers are generally less effective than their cooperative counterparts.

Researchers who study cooperation and competition agree that lawyers are more likely to be effective negotiators when they are cooperative than when they are adversarial.⁹

breakdown.”); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991).

6. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 463 tbl.1, 512 tbl.7 (2004) (noting that in federal court in 2002 about 3% of criminal cases ended in trial versus 1.8% of civil cases overall). Professor Sara Beale noted that criminal work was taking precedence over civil trials in the Federal Courts. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 988 (1995) (noting that the percentage differential has resulted in a slow accretion of civil resources to criminal cases).

7. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 634 n.11.

8. While there is a higher actual number of civil trials in federal court (3,006 civil jury verdicts in 2002 as compared with 2,655 criminal jury verdicts), Galanter, *supra* note 6, at 532 tbl.A-1, 554 tbl.A-17, in state courts the numbers are skewed more strongly toward criminal trials, *see, e.g.*, Nathan L. Hecht, *Jury Trials Trending Down in Texas Civil Cases*, 69 TEX. B.J. 854, 854 (2006) (“Of 2,419 average dispositions per court . . . 15.4 were by jury verdict, and, of [those], roughly 11 . . . were in criminal cases . . .”).

9. GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983); Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612, 620 (2006); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV.

Taken together, these facts suggest a simple syllogism: Trials are adversarial. Criminal practice involves a lot of trials. Adversarial practice is an indicator of competitive, ineffective negotiation. Therefore, criminal law must be full of competitive, ineffective negotiators who cooperate rarely.

The syllogism has some intuitive appeal and an obvious flaw: it is a simple explanation, but it is an inaccurate one. Criminal practice is one of the most cooperative practices in all of law. Most cases result in plea bargains, and the practice of criminal law is characterized by an ongoing stream of quickly settled cases.¹⁰ Despite the frequency and high visibility of trials, the agreed-upon plea is the real face of criminal practice. For every trial—bench or jury—more than a dozen other cases are resolved through agreement.¹¹ Most criminal cases settle.¹²

NEGOT. L. REV. 143, 147–48 (2002).

10. It is an unfortunate fact that there is so little data about this matter. However, anecdotal evidence and lay observation confirm this belief. The lack of data has been mourned by several commentators. See, e.g., Note, *Prejudice and Remedies: Establishing a Comprehensive Framework for Ineffective Assistance Length-of-Sentence Claims*, 119 HARV. L. REV. 2143, 2157 (2006) (“Reliable data do not even exist for the frequency of plea bargaining among cases that result in guilty pleas.”); *id.*, at 2148 n.43 (citing Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 n.9 (2004) (“[R]eporting data on guilty plea rates in federal district courts and state courts, and concluding that, ‘[t]hough it is impossible to be sure, most of these pleas probably resulted from plea bargains.’”)); see YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 28 (9th ed. 1999) (citing a study showing a “ratio of 11 pleas for every trial, with one jurisdiction having as many as 37 pleas for each trial”).

11. In a 2001 footnote, Professor William Stuntz stated the following:

In 1962, a sample of twenty-eight counties found a guilty plea rate of seventy-four percent for indigent defendants and forty-eight percent for defendants who retained counsel themselves. See 1 LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 22–23 tbl.3 (1965). A dozen years later, the overall guilty plea rate had risen to slightly over eighty percent. See DAVID A. JONES, CRIME WITHOUT PUNISHMENT 44 tbl.4-1 (1979). Another dozen years later, the rate for felonies alone exceeded ninety percent. See BARBARA BOLAND ET AL., U.S. DEP’T OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS—1987, at 3 (1990). It seems fair to assume that misdemeanors plead out at an even higher rate.

William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 566 n.230 (2001). The tendency to resolve criminal cases through guilty pleas is increasing. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90 (2005).

12. Professor Marc Galanter has noted that most cases settle, and in 2004, he published a landmark study describing how much trial rates have declined. See generally Galanter, *supra* note 6. In a follow-up piece, he noted specifically that criminal trial rates have declined precipitously. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*,

Criminal law is not unique in this respect. The practice of most areas of law is characterized by settlement,¹³ and the settlement rate of criminal cases offers no independent basis on which to conclude that criminal law involves a higher-than-average degree of cooperation between adversaries. When compared to other areas of practice, the settlement rate of criminal cases fares unfavorably.¹⁴ Nonetheless, there is ample evidence that suggests that the practice of criminal law is more cooperative than civil law.¹⁵ This cooperation takes the form of uniquely rapid, numerous, and easy settlements.¹⁶

It might be the case that a relatively high trial rate and a relatively cooperative practice could be explained as two unique and disconnected parts of criminal practice. An alternative explanation is that there is a relationship between the criminal trial rate and the cooperation found in plea bargaining. It is possible that the relatively high trial rate causes cooperation.

While commentators have offered data and explanations for the cooperativeness of one area of law relative to another,¹⁷ for the most

57 STAN. L. REV. 1255, 1257 n.5, 1258 n.9 and accompanying text (2005).

13. See generally, Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

14. See Galanter, *supra* note 6.

15. Some have suggested that this is a product of the prosecutor's role as an advocate for justice. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, § 13.10.4, at 765 (1986) ("The most striking difference between a prosecutor and a defense lawyer or any non-governmental lawyer is that a prosecutor is much more constrained as an advocate.").

16. See Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 642 (2002) (noting that slow disposition of civil cases in state courts may be the result of the high number of criminal cases, criminal case priority, and lack of judges and court personnel). For a more jaded perspective on why federal criminal cases result in pleas, see William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 74 (2006), stating the following:

On the criminal side of our federal courts, manipulation of the U.S. Sentencing Guidelines has the consequence of imposing savage sentences upon those who request the jury trial guaranteed them under the U.S. Constitution. These sentences are five hundred percent longer than sentences received by those who plead guilty and cooperate with the government. Small wonder that the rate of criminal jury trials in the federal courts is plummeting.

17. See, e.g., Schneider & Mills, *supra* note 9, at 616–19 & tbl.4 (comparing cooperation rates among various practice groups). Look to Peter W. Tague, *Guilty Pleas and Barristers' Incentives: Lessons from England*, 20 GEO. J. LEGAL ETHICS 287, 304 (2007) (citation omitted), for the following recent example of incentives:

In Maryland, for example, the current cap of \$5,200 enables the lawyer to be paid, at \$90 per hour, for fifty-seven hours of work. This is enough

part, they have neglected or underweighted the impact of trial frequency on negotiation practice. In this article, I assert that criminal trials increase cooperation in the negotiation of plea bargains in three ways: (1) trials add clarity about the prices of cases, (2) frequent contact with trial judges promotes good negotiation behavior, and (3) the ability to terminate unproductive negotiations results in increased cooperation.

My argument and this article are constructed in four sections and a conclusion. Following this introduction, I offer a short discussion of the work of Robert Axelrod relating to the ways that cooperation can emerge and thrive in competitive environments.¹⁸ Part III consists of applications and inquiries into cooperation in the practice of civil law. Specifically, I review the 1976 survey and analysis by Professor Gerald Williams,¹⁹ the 1994 work by Professors Ronald Gilson and Robert Mnookin on the effect of lawyers on the bargaining process,²⁰ and the 2002 and 2006 updates of Williams' work by Professor Andrea Schneider and Nancy Mills.²¹ In Part IV, I adapt these authors' works to the realm of criminal law, and I summarize theories developed specifically about cooperation in criminal law, focusing primarily on work by Professor Stephanos Bibas²² and prior work I have done.²³ In Part V, I advance the argument that trials in criminal law set prices, force an end to unproductive squabbles, and set higher standards for attorney behavior. In this section, I also explore whether the advantages offered by a ready supply of trials might be transportable to other practice areas or whether the nature of criminal law is sufficiently unique that any conclusions about bargaining practices should be strictly

time for an efficient lawyer to prepare a defense: to confer with the defendant several times, to review whatever discovery the prosecution provides, to undertake a cursory investigation of the prosecution's and the defendant's competing stories, to write a motion to exclude evidence, and to participate in the hearing on the issue. But the lawyer could not also fit a trial into the time that remains before he pierces the payment. Once he pierces the cap, he earns nothing. As he approaches the cap, then, his incentive to end the case by guilty plea mounts.

18. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

19. See generally WILLIAMS, *supra* note 9.

20. See generally Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

21. See generally Schnieder & Mills, *supra* note 9.

22. See generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

23. See generally Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205.

limited.

II. COOPERATION, GENERALLY

A question central to all negotiators, not just to lawyers, and certainly not just to criminal practitioners, is whether it is possible to cooperate and thrive, or whether the folk aphorism that “nice guys finish last”²⁴ is sad but true. This question became the central focus of a 1984 work by Professor Robert Axelrod.

In his classic, *The Evolution of Cooperation*,²⁵ Professor Axelrod described the results of a computer-based tournament in which various strategies competed with each other in a so-called Prisoner’s Dilemma game. You may recall that the Prisoner’s Dilemma represents a two-player game in which each player must simultaneously choose between cooperation and competition with the other player, and which has a payoff structure that yields the best result when one competes in the face of the other player’s cooperation. The next best payoff comes with mutual cooperation, the next best comes with mutual competition, and the worst comes when one cooperates and his opponent competes. Together with a requirement that the mutual cooperation payoff must be more than the sum of one-half of the so-called “temptation” payoff and one-half of the so-called “sucker’s payoff,” the dilemma yields a dominant strategy of competition.²⁶

The dilemma, of course, is that there are two stable equilibria in the game: compete/compete and cooperate/cooperate. Players acting rationally—in the limited sense in which that word is used by economists—will end up in the worse of the two equilibria. For those of you unfamiliar with the tautology associated with the dilemma, let me offer this example: Assume that you and I agree that I will sell you an object you desire and you will send me a check, and we agree to exchange these items in the mail. If we further assume that you and I

24. This quote has been attributed to baseball coach Leo Durocher. See, e.g., Baseball Almanac, Leo Durocher Quotes, <http://www.baseball-almanac.com/quotes/quoduro.shtml> (last visited Sept. 22, 2007).

25. AXELROD, *supra* note 18, at 27–54.

26. See generally JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1947) (discussing the formation of games to explain rational behavior); AXELROD, *supra* note 18, at 8. Axelrod labels the conditions for a prisoner’s dilemma as follows: “temptation to defect” (T), “reward for mutual cooperation” (R), “punishment for mutual defection” (P), and the “sucker’s payoff” (S). *Id.* In order for a dilemma to exist, T must be greater than R which is greater than P which is greater than S; and 2R must be greater than T + S. *Id.* at 9–10.

are acting in an economically rational manner, I face a choice, the making of which will determine, in part, how much utility I gain from the transaction, i.e., how well I do. One option I have is to send you the object—the cooperate option. The other is to lie and say I sent it when I had not—the compete option. You could send me a check written on an account with sufficient funds, thus cooperating, or you could send me a check that would bounce when I cashed it, thus competing.

Each of us would be rational self-interested maximizers of utility²⁷ if we acted competitively. You would prefer to have the object and not have to pay for it, so if I send the object, you are rational to send a bad check and get the object for free. And certainly, if I sent nothing, you would prefer to send a bad check. So, no matter whether I cooperate or compete, you do better by competing. I work according to similar logic, and the result is that you send me a bad check and I send you nothing. This is not necessarily a bad result, but a better result for both of us would occur if you sent a good check and I sent the object.

This dilemma—that rational choice leads to suboptimal results—has led to a great many inquiries into how negotiators might beat the dilemma.²⁸ Professor Axelrod extended invitations to many esteemed academics and others to participate in a tournament in which their strategies would play a multi-round Prisoner's Dilemma game.²⁹ The goal was to see whether the suboptimal result was inevitable, or whether cooperative strategies might prevail in an environment in which the default choice is competition.³⁰

The tournament was run twice with different sets of participants.³¹ In each tournament, the winner was a simple strategy known as “Tit-For-Tat” (“TFT”).³² TFT started out by cooperating and then merely mimicked the prior move of the other player.³³ If the other player

27. The term “rational actor” has come to describe the economic aspiration that the actor will make all decisions in such a way as to maximize total utility. For discussion of the current view of rationality see, for example, Craig R.M. McKenzie, *Rational Models as Theories—Not Standards—of Behavior*, 7 TRENDS IN COGNITIVE SCI. 403, (2003); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, (2000).

28. For an update on continuing efforts to create an optimal strategy, see Wendy M. Grossman, *New Tack Wins Prisoner's Dilemma*, WIRED, Oct. 13, 2004, <http://www.wired.com/culture/lifestyle/news/2004/10/65317>.

29. AXELROD, *supra* note 18, at 30.

30. *Id.* at 30–31.

31. *Id.* at 40.

32. *Id.* at 31, 42.

33. *Id.* at 31.

cooperated in round N, then TFT cooperated in round N+1.³⁴ If the other player defected in round N+1, TFT would defect in round N+2, and so on.³⁵

The results were somewhat surprising in that TFT was incapable of surpassing any individual player in any game. The best it could do was to tie, and yet it won the tournament twice.³⁶ In fact, after TFT won the first tournament, the second round was enlarged to permit more entries, and several of these entries were designed specifically to best TFT. And despite the existence of such entries, TFT won the second, larger tournament as well.³⁷

In an effort to better understand how people might adopt the behaviors of TFT and thereby obtain its results, sociological characteristics were associated with TFT. There were four. TFT was deemed “nice,” “retaliatory” (provocable), “forgiving,” and “clear.”³⁸ It always cooperated in the first round, then it hit back if you hit, forgave immediately and completely after only one instance of cooperation. It was consistent and easy to figure out.

Axelrod also offered advice for those who would structure an environment to nurture cooperation.³⁹ Sociological messages for reformers were to make games that consist of repeat play with no known ends, and to make sure that each future round threatened to be as important, or more so, than the current round.⁴⁰

Axelrod described the conditions in which a small cluster of cooperators could infiltrate a group of competitors by simply choosing to do repeat business with those with a propensity to reciprocate and ceasing interactions with those who take advantage of them. The size of the cooperative cluster need only be a mere fraction of the larger whole for the cooperation to be a dominant strategy.⁴¹ One note of caution, however, is that in a world of consistent cooperators, a competitor who cannot be removed from the group will thrive and spawn imitators. Thus, there is an equilibrium that favors cooperators who can readily recognize each other, but that allows a group of exploitative competitors to exist and perhaps even “outcompete” the cooperators.

34. *Id.* at 13.

35. *Id.* at 13–14, 31.

36. *See id.* at 13–14, 42.

37. *Id.* at 42.

38. *Id.* at 54.

39. *Id.* at 124–41.

40. *Id.* at 129–30.

41. *See id.* at 92–93, 140.

Axelrod's theory is quite compelling. On the one hand, it offers a recipe for cooperation on the individual and social level, and it does so in as objective and scientific a manner as any I have seen. But there is a flip side. It suggests that in the absence of repeat play, or when it is difficult to identify a cooperator or a competitor, because of difficulty receiving or interpreting a "move," competitive behavior may occur more frequently.⁴² Furthermore, not all situations have clear payoff structures, and so the extension of Axelrod's theory to the "real world" should be undertaken cautiously.

Axelrod did not explicitly discuss the adaptation of his theory to law. For that we turn in the next part to law professors who have studied cooperation and competition in the practice of law, a pair of whom explicitly adapted Axelrod's work to the practice of law.

III. COOPERATION IN LAW

In their 1984 article, *The Selection of Disputes for Litigation*,⁴³ Professors George Priest and Benjamin Klein suggested that cases settle when expectations about outcomes converge.⁴⁴ However, many later commentators have suggested Priest and Klein's view was naïve—that the calculus is more complex.⁴⁵ In this portion of the article, I examine several of the most important analyses of cooperation in the practice of law.

This part consists of two sections. The first concentrates on the work of Professors Ronald Gilson and Robert Mnookin and their 1994 article, *Disputing Through Agents: Cooperation and Competition Between Lawyers in Litigation*,⁴⁶ Gilson and Mnookin's methodology is an adaptation of Axelrod's work into their areas of concentration—corporate and family law.⁴⁷ The second section focuses on empirical work begun in 1976 by Professor Gerald Williams⁴⁸ and continued in

42. Gilson & Mnookin, *supra* note 20, at 522.

43. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

44. *Id.* at 16.

45. See, e.g., Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337, 339–40, 352 (1990); Daniel Friedman & Donald Wittman, *Litigation with Symmetric Bargaining and Two-Sided Incomplete Information*, 23 J.L. ECON. & ORG. 98, 101–02 (2007); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 495–98 (1996).

46. See generally Gilson & Mnookin, *supra* note 20.

47. *Id.* at 513.

48. WILLIAMS, *supra* note 9.

2002⁴⁹ and 2006⁵⁰ by Professor Andrea Schneider. Gilson and Mnookin adapted Axelrod's study to law, whereas Williams and Schneider offered data-based analyses of peer reviews of lawyers' behavior in negotiation.

A. Disputing Through Agents

Gilson and Mnookin's article consists of four parts and an introduction; I will summarize each briefly.

The authors get right to the central question in the first sentence: "Do lawyers facilitate dispute resolution or do they instead exacerbate conflict and pose a barrier to the efficient resolution of disputes?"⁵¹ Gilson and Mnookin note that most economic analysis of litigation rests on a simplifying assumption, namely that litigation is conducted by its principals, whereas the reality is that most litigation is conducted via agents.⁵² Gilson and Mnookin point to two warring conceptions of the lawyer. One is that of the big-city litigator who becomes part of the problem by adding costs to every conflict, acting on incentives to protract the conflict, and milking the conflict for its financial and reputational value.⁵³ The other is that espoused by Abraham Lincoln in his famous "peacemakers" speech.⁵⁴ This alternative conception is one in which the lawyers' emotional detachment allows them to cooperate where their clients cannot, and they prosper by negotiating cooperatively and developing reputations for cooperation.⁵⁵

The first main part of the article employs the Prisoner's Dilemma as a model for attorney behavior in discovery. Discovery was chosen as a microcosm of the litigation process, and not unreasonably so because discovery is often the lengthiest and most expensive part of litigation. Gilson and Mnookin posit a world in which party "A" faces two choices. He can hand over all relevant, requested information or he can hide unfavorable information and thereby provoke discovery costs. The model suggests that if the judge were to divide \$100 between A and B, and both A and B would "cooperate," the judge would award \$50 to

49. Schneider, *supra* note 9.

50. Schneider & Mills, *supra* note 9.

51. Gilson & Mnookin, *supra* note 20, at 509.

52. *Id.* at 510.

53. *Id.* at 510–12.

54. *Id.* at 512.

55. *Id.* at 509–12.

each party.⁵⁶ If both inflict costs of \$15 by withholding, there would be parity, but only \$70 to split, so each side would get \$35.⁵⁷ However, if one side is able to withhold and the other discloses, then the disclosing party would suffer a disadvantage. Of the \$85 remaining—recall that one of the parties forced a \$15 expenditure—the judge would award \$70 to the non-cooperator and only \$15 to the cooperator.⁵⁸

In such a game, the traditional rules associated with the one-shot Prisoner's Dilemma would apply, and each party would have an incentive to defect. Gilson and Mnookin suggest that the Prisoner's Dilemma may be properly adapted to most civil litigation, because while there may not be the sort of symmetry associated with the theoretic game model, there are still often gains to be made through cooperative trades, and the worst outcomes seem to come only when both sides are hell-bent on concealing information and inflicting costs on each other.⁵⁹ To the extent that the theoretic game model relies on simultaneous disclosure of strategies, ignorance of the other parties' moves, a lack of credible communication between the parties, and litigation subject to verifiable agreements, the real world fails to resemble the model. However, Gilson and Mnookin point out that "in many cases, particularly complex ones, the parties may not be able to specify . . . the terms of such an agreement in advance."⁶⁰ Why? It is hard to know whether someone concealed information, and it makes little sense to expect that a promise to litigate cooperatively would be respected or enforced.

The authors then look to the notion that multi-round games with no known end and an appropriately calibrated discount parameter lead to cooperation even in Prisoner's Dilemma situations.⁶¹ This TFT strategy may work in theoretical models, posit Gilson and Mnookin, but not in litigation where the number of subgames inherent in litigation is knowable and finite, and the payoffs for each round may be out of sync with those of other rounds.⁶² Thus, the "no known end" requirement is impossible to meet, as is the fixing of a discount parameter.⁶³ Within a given piece of litigation, the shadow of the future is well known. Finally,

56. *Id.* at 515.

57. *Id.*

58. *Id.*

59. *Id.* at 516.

60. *Id.* at 517.

61. *Id.* at 520–21.

62. *Id.* at 521.

63. *Id.*

the moves of the litigants are not binary—they do not fall into black and white categories of cooperation or defection.⁶⁴ A litigant's behavior might be somewhat competitive, e.g., she might withhold some harmful information and disclose some harmful information. Does the behavior rise to the level of competition to be deemed a defection requiring TFT retaliation, or is it sufficiently cooperative to keep the game moving?⁶⁵

The authors conclude that the Prisoner's Dilemma is a model worth using to compare litigation to, but that it is an imperfect comparison.⁶⁶

However, in Part II, they suggest that to the extent there is overlap between the litigation game and the Prisoner's Dilemma, lawyers can help litigants overcome the negative effects associated with unbridled competition.⁶⁷ The authors suggest a hypothetical pre-litigation game in which litigants can choose a lawyer who only cooperates or one who only competes.⁶⁸ If one chooses a cooperator and the other chooses a competitor, the cooperator may re-select and choose a competitor.⁶⁹ Then they are stuck and cannot change lawyers again.⁷⁰ In this game, the parties have no incentive to choose a competitive lawyer.⁷¹ If one chooses a competitor, her opponent will already have chosen a competitor or will switch to a competitor, thus ensuring the equal but inferior compete/compete (\$35/\$35) payoff.⁷² In contrast, if both choose cooperators, they enjoy the equal and superior cooperate/cooperate (\$50/\$50) payoff.⁷³ There is no way to get the \$70, so if the choice is cooperate and get \$50 or compete and get \$35, there is no choice.⁷⁴

Gilson and Mnookin suggest that this game's rules are not implausible. Lawyers have reputations for cooperation and competition, and it is inexpensive to switch lawyers at the start of litigation. Moreover, while it is possible to switch lawyers midstream, it is very costly and happens rarely.⁷⁵

The authors move on to a discussion of a reputation market for

64. *Id.* at 521–22.

65. *Id.* at 520–22.

66. *Id.* at 521.

67. *Id.* at 522.

68. *Id.*

69. *Id.* at 522–23.

70. *Id.*

71. *Id.*

72. *Id.* at 523.

73. *Id.*

74. *Id.*

75. *Id.* at 523–24.

lawyers.⁷⁶ If a lawyer could credibly commit to cooperation, he would be more likely to be hired by clients looking for the cooperation surplus. While the lawyer could probably defect in ways that would be unpunishable—most discovery violations are known to the other side but do not rise to a level of proof that permits sanctions⁷⁷—in a reputation market, the opposing lawyer could presumably sully the reputation of the supposedly cooperative lawyer.⁷⁸

However, there are principal-agency problems. The lawyers could conspire to run up fees. There is a law-folk aphorism that says that “many a vacation home has been built on a discovery schedule.” If both lawyers recognize that fighting is good for their purses, they may fight even where peacemaking would provide greater benefit to the clients. Conversely, a lawyer with a cooperation reputation may run into a client who says, “Defect and compete or I will fire you.” The lawyer who can afford to be fired will withstand the threat, whereas, the lawyer who needs the money from the client will be more likely to capitulate.⁷⁹

Moreover, law firm structure makes the problems worse. Lawyers are promoted based on billable hours. Compensation among partners is handled in a similar fashion. And law firms have many players in them, some with reputations as sharks and others as doves. So the existence of the modern law firm makes it more difficult for lawyers to develop reputations as cooperators.⁸⁰

However, Gilson and Mnookin find that many lawyers cooperate despite the obstacles. Gilson and Mnookin discuss this in Part III, *Understanding the Landscape of Litigation*. The discussion centers around negotiation behavior in two distinct fields of practice: corporate law and family law.⁸¹ Corporate law is deemed “contentious,”⁸² while family law is deemed “generally cooperative.”⁸³

Corporate law is contentious, contend the authors, because the payoff structure favors combat.⁸⁴ As courts’ caseloads increased, so did incivility among the lawyers. The authors conjecture that some new forms of corporate litigation produced higher payoffs for the

76. *Id.* at 525.

77. *Id.* at 526.

78. *Id.* at 527.

79. *Id.* at 527–29.

80. *Id.* at 530–32.

81. *See id.* at 513.

82. *Id.* at 534.

83. *Id.* at 541.

84. *Id.* at 534–35.

competitive players than for the cooperators. Among these cases are cases filed strategically to delay a hostile takeover or to wage a war of attrition.⁸⁵

Moreover, statutory prejudgment interest rates were, at times, sufficiently low so that an entity could rationally choose to invest the money it owed while it dragged out an appeal because the investment payoff was high enough to cover the interest and the accruing attorney's fees plus some.⁸⁶

In addition, the corporate bar expanded enormously between 1960 and 1990. For example, in 1968, the largest law firm had 169 lawyers.⁸⁷ In 1993, the largest firm had 1,662 lawyers, and there were 184 firms larger than the largest firm from 1968.⁸⁸ Naturally, with so many more lawyers, the likelihood of litigating against the same lawyer diminished substantially, and the possibility of TFT's repeat play was lessened.⁸⁹

Finally, the kinds of litigation seen in the 1990s were more complex than those of the 1960s. This led to less clarity regarding a "move" from the "opposing player." It was harder to decide whether your opponent was cooperating or defecting. Litigation became noisy.⁹⁰

In short, TFT might not be viable in corporate law because it is hard to know whether someone is cooperating or competing—rendering "nice" and "clear" unworkable, and "retaliatory" and "forgiving" risky. If the preeminent cooperative strategy is not viable, it is no wonder that competition rules the day.

In contrast, family law was characterized by a payoff structure that militated strongly in favor of cooperation. A lawyer had a large stable of clients, so no one client could force a lawyer to forfeit a hard-won reputation for a short-term gain.⁹¹ The kids are growing up while the divorce lingers, so moving quickly is paramount. There are financial gains attendant to dividing assets in a way that maximizes value.⁹²

The structure of the family law bar is localized and specialized. Lawyers see each other often and litigate against each other with some predictable frequency. Organizations exist that facilitate the spreading

85. *Id.* at 536–37.

86. *Id.* at 535–36.

87. *Id.* at 538.

88. *Id.*

89. *Id.* at 537–38.

90. *Id.* at 540.

91. *Id.* at 546.

92. *Id.* at 541–43.

of reputations. And cooperators prefer to work with other cooperators.⁹³ In short, it is easy to know whether someone is being “nice” and “clear,” and that makes “retaliatory” (provocable) and “forgiving” possible.⁹⁴

Part III concludes with “tentative generalizations.”⁹⁵ The first of these is that the size of the legal community matters a great deal—when regulars see other regulars a lot, cooperation increases, probably because community norms become clarified and that makes the norms more salient. People learn how to recognize cooperation and defection, and they learn how to practice each mode.⁹⁶ The second tentative generalization is that lawyers tend to cooperate when they have incentives to cooperate.⁹⁷ When the incentives are skewed in favor of billing more hours, that is what they will do.⁹⁸ When the incentives promote cooperation, they will cooperate. The third generalization is that complexity of cases matters—the less complexity, the more cooperation.⁹⁹ It is easier to recognize and accurately label behavior in simpler cases.¹⁰⁰ And the fourth generalization is that legal cultures may vary from place to place, and a community may have practice norms that come from long-term players or from judges or other participants who share and promote institutional norms.¹⁰¹

Part IV of Gilson and Mnookin’s article argues that current rules and organizations may pose obstacles to increased cooperation. Gilson and Mnookin note that ethical rules make it difficult to withdraw from representing a client when the client wants the lawyer to pursue an aggressive strategy; thus, the lawyer will have a hard time cultivating and maintaining a reputation for cooperation.¹⁰² While cooperative boutiques and cooperative departments in law firms may help somewhat in reputation making, these boutiques and departments will likely exist in the context of a legal culture in which it is difficult to ascertain whether a firm or department has or is adhering to a set of cooperative

93. *Id.* at 543–46.

94. *See id.*

95. *Id.* at 546.

96. *Id.* at 546–48.

97. *Id.* at 548.

98. *Id.* at 532, 548.

99. *Id.* at 548.

100. *Id.* at 548–49.

101. *Id.* at 549–50.

102. *Id.* at 550–57.

norms.¹⁰³

The authors conclude that if a lawyer could develop a reputation as a collaborative problem solver, that reputation might be a valuable asset. Where lawyers know and trust each other, there will be “substantial opportunities for both parties to benefit by reducing transaction costs.”¹⁰⁴ Their theory suggests that reputation would be easiest to maintain in a smaller legal community, and that less complex cases would yield greater clarity about whether someone was defecting or cooperating.¹⁰⁵

B. Empirical Surveys of Attorney Behavior in Negotiation

In 1976, Professor Gerald Williams mailed a survey to 1,000 attorneys practicing in the metropolitan Phoenix area.¹⁰⁶ Williams asked the attorneys to recall their most recent experience negotiating a claim with opposing counsel. The survey asked the respondent to offer information about the negotiating style and practices of their counterpart. The lawyers used lists of adjectives,¹⁰⁷ lists of pairs of adjectives—rating one against the other—and attributions.¹⁰⁸ The survey asked for effectiveness ratings¹⁰⁹ and general descriptions of the matter that was the subject of the negotiation on which the lawyer was reporting.¹¹⁰

Williams divided the world of lawyers into a cooperative group and a competitive group, and then broke each group into effective, average, and ineffective. Williams found that 65% were cooperative and 24% were competitive;¹¹¹ the averages of effective and ineffective for each category were as follows: 38% were cooperative and effective negotiators, 24% were cooperative and average negotiators, 2% were

103. *Id.* at 557–61.

104. *Id.* at 564.

105. *Id.* at 565.

106. Of the original 1,000 surveys sent out, 351 attorneys responded. WILLIAMS, *supra* note 9, at 138.

107. There were seventy-seven different adjectives, and the lawyers were asked to rate their negotiation counterpart on a scale of zero to five on each adjectival quality. *Id.* at 137–38.

108. There were forty-three pairs of antonyms, and the lawyers rated their counterparts' placement on the spectrum. *Id.* at 138.

109. Lawyers rated their counterparts on a scale from one to nine for effectiveness, with nine being the most “effective.” See, e.g., Schneider, *supra* note 9, at 155–56.

110. For example, was it a dispute or transaction? Will the parties comply with the settlement or contract? WILLIAMS, *supra* note 9, at 138.

111. Eleven percent were not identifiable as competitive or cooperative. *Id.* at 19.

cooperative and ineffective negotiators, 6% were competitive and effective negotiators, 10% were competitive and average negotiators, and 8% were competitive and ineffective negotiators.¹¹²

When boiled down, Williams' survey shows that a high percentage of the lawyers considered cooperative were also considered effective, and that while there were effective competitive lawyers, they formed a small group. In addition, there were a great many ineffective competitors.

The survey results demonstrated that one need not be a blustering competitor to be effective. In fact, lawyers were deemed more effective if they were problem solvers, prepared, courteous, and thoughtful. While there were effective competitors, they were labeled with similarly positive adjectives—prepared, looking out for their client, etc.

The Williams study started a conversation that has lasted more than thirty years. However, the study was limited. It did not divide lawyers by practice area, and it did not address outside forces that contributed to the practice norms that defined a field of law. However, the survey would enjoy a substantial update in 2002 that would help illuminate some of the areas left unexplored in the 1976 Williams study.

In 2002, Professor Andrea Schneider published a very substantial update of Williams' original survey.¹¹³ Her work was based on surveys sent in 1999 to 2,500 lawyers, with 618 responses.¹¹⁴ Schneider's survey updated many questions and terms used by Williams, but also divided the lawyers into practice areas, asked about practice and training in ADR, and in addition, used different methods of analysis for interpreting the results.¹¹⁵

Professor Schneider found that in the twenty-five years intervening between the studies—despite the fact that more women and minorities had entered the field of law, that ADR training was available at more law schools, and that courts and legislatures had incorporated ADR fully into their work¹¹⁶—the number of adversarial lawyers had risen from 27% to 36%, and that the number of ineffective lawyers had risen from 12% to 22%.¹¹⁷ She states:

112. *Id.*

113. *See generally* Schneider, *supra* note 9, at 148–96.

114. *Id.* at 157, 163.

115. *Id.* at 153–57.

116. *See id.* at 150–51, 156–57, 190–91; Robert W. Fairchild & Arthur J. Thompson, *Will the Legal Profession Ever Be the Same? Disappearing Trials and ADR in Kansas*, J. KAN. B. ASSOC., May 2007, at 18, 21–24.

117. Schneider, *supra* note 9, at 189.

Only 9% of those lawyers seen as adversarial were rated as effective by their peers and only 9% of all effective lawyers were described as adversarial. Furthermore, 90% of lawyers perceived as ineffective were also adversarial. In contrast, 91% of lawyers seen as effective took a problem-solving approach to negotiation. More than half of problem-solving lawyers were seen as effective and only 4% of these problem-solving lawyers were seen as ineffective. Contrary to the popular (student) view that problem-solving behavior is risky, it would seem instead that adversarial bargaining represents the greater risk. A lawyer is much more likely to be viewed as effective when engaging in problem-solving behavior.¹¹⁸

Moreover, the adversarial tactics had grown harsher over the years. While 1976 aggressive negotiators were sometimes described in positive terms (e.g., “competitive,” “tough”),¹¹⁹ 1999 lawyers were described as “arrogant” and “egotist[ical].”¹²⁰

The top five adjectives describing the effective competitive negotiator in the Williams study were: (1) convincing; (2) experienced; (3) perceptive; (4) rational; and (5) analytical. None of these adjectives has a particularly negative connotation. In fact, perceptiveness can demonstrate interest in one’s opponent’s position. Now the top five adjectives describing an effective adversarial negotiator are: (1) egotistical; (2) demanding; (3) ambitious; (4) experienced; and (5) confident.¹²¹

Professor Schneider’s survey results were reported according to cluster analysis.¹²² In a four-cluster analysis, lawyers were described as “true problem-solving” (“TPS”), “cautious problem-solving” (“CPS”), “ethical[ly] adversarial” (“EA”), and “unethical[ly] adversarial” (“UA”).¹²³ TPS attorneys were approximately 39% of the bar, but 72%

118. *Id.* at 167.

119. WILLIAMS, *supra* note 9, at 23–24, 28.

120. Schneider, *supra* note 9, at 186–87.

121. *Id.* at 187.

122. *Id.* at 162.

123. *Id.* at 180.

were deemed “effective” (“e”).¹²⁴ CPS attorneys were approximately 28% of the bar, but only 24% were deemed effective.¹²⁵ EA attorneys were approximately 22% of the bar, but only 16% effective.¹²⁶ And approximately 13% were UA attorneys and only 3% were effective.¹²⁷ This means that of 618 attorneys, there were about 171 eTPSs, 40 eCPSs, 21 eEAs, and 2 eUAs.¹²⁸

Cooperation has declined, but effectiveness as of 2002 was still highly correlated with cooperation, as it was when Williams did his survey in the 1970s.

In 2006, Professor Schneider and Nancy Mills published a follow-up report about the application of the survey to the practice of family law.¹²⁹ Schneider’s article explodes the myth that family law attorneys are cooperative.¹³⁰

The 2006 article focuses on practice areas, with very interesting results. Criminal law had the highest percentage of TPS attorneys, followed by property, corporate, commercial, and then family law—above only civil law and the “other” category.¹³¹ Moreover, family law had the highest percentages of UA attorneys—more than seven times the percentage of UA corporate attorneys.¹³² In addition, family law had the highest percentage of adversarial attorneys—nearly 40% of that population.¹³³

So, it appears that family law may not be so cooperative after all. Why is this the case? Professor Schneider offers five possible explanations. The first is that clients push negative behavior.¹³⁴ The second is the context, that is, the nature of family law. Schneider characterizes the practice as emotional and largely adversarial.¹³⁵ The third is that easy cases “go pro se”; apparently, lawyers are signals of

124. *See id.* at 184.

125. *See id.*

126. *See id.*

127. *See id.*

128. *Id.*

129. Schneider & Mills, *supra* note 9.

130. *Id.* at 617 (“Family law had the highest percentage of unethically adversarial lawyers . . .”).

131. *Id.* at 616 tbl.4, 617.

132. *Id.*

133. *Id.*

134. *Id.* at 618.

135. *Id.* at 618.

breakdowns in communications or some other difficulty.¹³⁶ The fourth argument is that custody cases represent an increasing percentage of family law practice and that these cases are particularly contentious.¹³⁷ Finally, Professor Schneider suggests that it is possible that family law is practiced by “tourists” more than some other fields. A non-family lawyer might “do a divorce” now and again, and in the aggregate, these visiting lawyers impede the ready creation of a reputation market.¹³⁸

These conclusions stand in marked contrast to Gilson and Mnookin who posit that clients in divorce have scant ability to control their attorneys’ decision making,¹³⁹ that family law presents abundant opportunities for value creation,¹⁴⁰ and that family law is one of the areas in which lawyers typically dampen conflict.¹⁴¹ In her articles, Professor Schneider points to reasons why the Williams data might be different from hers—among these are that in the twenty-five years between the two studies, more women lawyers entered the profession and more ADR courses were offered.¹⁴² However, it is harder to reconcile the 1994 Gilson and Mnookin conclusions with the 1999 Schneider conclusions.

While their works are at times at odds, what is clear from Williams, Gilson and Mnookin, and Schneider is that it is more likely that one will be considered an effective negotiator if one is cooperative, and that practices that are local, relatively noise-free, and consisting of many small cases are more likely to be cooperative. We now turn to look more specifically at cooperation in criminal law.

IV. EXPLAINING COOPERATION IN CRIMINAL LAW

This part consists of four sections. One adapts Gilson and Mnookin’s work, *Disputing Through Agents*, to criminal law. The second discusses the application of Schneider’s survey to criminal law.

136. *Id.* at 619.

137. *Id.*

138. *Id.*

139. Gilson & Mnookin, *supra* note 20, at 546 (“[A] family law specialist is usually not unduly dependent upon a single client for his or her livelihood. This should make it easier . . . to resist client pressure to defect . . .”).

140. *Id.* at 542.

141. *Id.* at 542–43, 546. Gilson and Mnookin are cautious that a reader not assume too much from the limited sample of family attorneys studied, but they are consistent in highlighting family law as a field in which attorneys tend to cooperate and which has the attributes of a field rife with cooperation. *Id.*

142. Schneider, *supra* note 9, at 150–51, 190–91.

The third is a summary of Stephanos Bibas' work, *Plea Bargaining Outside the Shadow of Trial*. And the last section offers a summary of my 1999 article, *Reconciling Loss Aversion and Guilty Pleas*.

A. Disputing Through Agents in Criminal Law

When one analyzes the four major criteria listed in *Disputing Through Agents* in the realm of criminal law, the conclusion is that criminal practice would seem likely to be quite cooperative—comparing favorably to the cooperation Gilson and Mnookin found in family law.

First, the incentives¹⁴³ for lawyers to cooperate in criminal law are high. Courts are overwhelmed with cases, and assistant district attorneys have too many cases to try even ten percent of their caseload.¹⁴⁴ Public defenders share this burden, while quasi-private and private lawyers learn not to rock the boat. Judges and clerks have mandates to process cases quickly, and they have all manner of means to retaliate against those lawyers who stand in the way.¹⁴⁵

However, while they have incentives to cooperate, criminal lawyers have few opportunities for value creation.¹⁴⁶ Creative programs that provide alternative care for offenders are typically overrun with demand, and the only bargaining currency of practical value is more zero-sum days in jail or on probation. This stands in marked contrast to family law, where every dollar saved from taxes is a joint gain for the litigants, and every allocation of value to the party most desirous of it

143. Gilson & Mnookin, *supra* note 20, at 548.

144. See, Birke, *supra* note 23, at 233 n.91.

145. See, e.g., *id.* at 241.

146. See Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 44 (2006).

Efficiency issues often seem taboo in criminal justice debates, perhaps because the human stakes are so high for serious crimes and significant punishments. Yet efficiency concerns regularly influence sentences. In plea bargaining, prosecutors offer sentencing discounts in exchange for waivers of trial and other procedural rights. Resource constraints have always influenced various sentencing options, from imprisonment to alternative sentencing schemes to rehabilitative programs.

Id. Cf. Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 343–49, 352–54 (2004) (noting that incarceration might be an inefficient and ineffective way to maximize utility). Brown makes only passing reference to limited legislative support for alternative programs, indicating that a massive shift in priorities would need to occur before cost-benefit analysis would be practicable in criminal law. *Id.* at 352–54. But among the first such shifts would be more money for alternative programs. *Id.*

represents the potential to increase the size of the negotiation pie.

Second, the practice of criminal law, like family law, is a local practice.¹⁴⁷ Prosecutors are typically county employees and even the largest counties are relatively contained geographic areas.¹⁴⁸ Defense attorneys may travel their state, but rarely are they members of more than one bar—and while defense attorneys living near a border may be cross-licensed, their travel is still discrete—especially as compared with a high profile plaintiff's attorney who might have cases all over the country.

However, turnover among district attorneys is typically pretty high, especially at the lower ranks.¹⁴⁹ While this fact might seem to cut against

147. See Gilson & Mnookin, *supra* note 20, at 546–47.

148. For example, Middlesex County, Massachusetts is now the twenty-third largest county by population, POPULATION DIV., U.S. CENSUS BUREAU, POPULATION ESTIMATES FOR THE 100 LARGEST U.S. COUNTIES BASED ON JULY 1, 2006 POPULATION ESTIMATES: APRIL 1, 2001 TO JULY 1, 2006 (2007), <http://www.census.gov/popest/counties/CO-EST2006-07.html> (last visited Oct. 3, 2007), and in 1986, when I was there, it was about ten places higher, with a population of almost 1.4 million, see POPULATION ESTIMATES AND POPULATION DISTRIBUTION BRANCHES, U.S. CENSUS BUREAU, INTERCENSAL ESTIMATES OF THE RESIDENT POPULATION OF STATES AND COUNTIES: 1980–1989 (1992), <http://www.census.gov/popest/archives/1980s/e8089co.xls>. While it consists of *fifty-four* cities and towns, that county is less than two hours drive from end-to-end in any direction. Los Angeles County is the largest by population—approximately 10 million—and still only covers an area of 4,084 square miles. L.A. County Online, Overview, <http://lacounty.info/overview.htm> (last visited Sept. 14, 2007). The next largest county, Cook County, Illinois, is half that population with only 956 square miles, see Office of the Secretary to the Cook County Board of Commissioners, Municipalities in Cook County, www.co.cook.il.us/secretary/HomePage_Links/municipalities_in_cook_county.htm (last visited Sept. 14, 2007), and the third, Harris County, Texas, is merely a third as populous, see POPULATION DIV., U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR TEX.: APRIL 1, 2000 TO JULY 1, 2006 (2007), <http://www.census.gov/popest/counties/tables/CO-EST2006-01-48.xls>.

149. See Thomas J. Charron, *Law School Loans and Lawyers in Public Service*, 40 PROSECUTOR 6 (2006) (indicating that many offices have turnover rates near fifty percent); see also Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 59–60 (2005). Dunahoe argues that state prosecutors want to try and maximize “professional gain.”

The office of State Assistant District Attorney is frequently but one pit stop on the highway to private sector employment. The transitory nature of the office is explained by Gerald Lynch, himself a former prosecutor, to exemplify characteristic features distinguishing the Anglo-American adversarial system of criminal justice from its civilian counterpart:

In civilian systems, both prosecutors and judges are career civil servants, selected at an early age by merit-based criteria, and then advanced over the course of their careers by normal bureaucratic processes. American prosecutors are a much more mixed bag. Some

the notion of a “local practice,” I suggest that high turnover among lower ranked employees results in increased norm-setting by a smaller cadre of higher ranked prosecutors. The new prosecutors are mentored¹⁵⁰ and trained by a more stable population of lawyers, and these lawyers establish, monitor, and shape the practices of their new hires. In this way, new lawyers are quickly trained how to behave like locals. In this respect, family law is similar to criminal law.

Third, noise¹⁵¹ is relatively low in criminal cases. Simple and common cases—assault, drug possession, shoplifting, or impaired driving, to name a few—have only so many variations. After a few dozen cases, an observer sees much of the spectrum.¹⁵²

The form of proof is also very consistent. The main form of proof is testimony from police officers, and to a lesser extent, lay testimony and occasional laboratory reporting. Even where there is a lab question—breathalyzer, DNA—there is typically a flurry of court activity and then a widely accepted answer to any question of admissibility or weight.¹⁵³

As a result of this simplicity, prosecutors and defense attorneys have no difficulty knowing whether one’s counterpart is dealing fairly. Certainly, some criminal matters are exceedingly complex, and some matters are hotly contested, but the number and type of criminal cases is

are career civil servants, who join a prosecutor’s office shortly after admission to the bar, and remain in that role essentially for the rest of their career. Others, who might also join the staff at a very young age, are more transient, seeking a few years of excitement, public service, or intense trial experience before pursuing private sector opportunities as criminal defense lawyers or civil litigators.

Id. (quoting Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2149 (1998)).

150. Charron notes that one of the incidents of high loan debt is increased need for new DA training. Charron, *supra* note 149, at 6.

151. Gilson & Mnookin, *supra* note 20, at 548.

152. For example, very drunk people caught behind the wheel, very drunk people not behind the wheel, somewhat drunk people caught after an accident, marginally drunk people pulled over for a broken taillight, etc. There are variations based on evidence and variations based on law, but the basic questions—was the defendant driving, was the defendant impaired by consumption of alcohol, did the driving occur on a public thoroughfare—remain the same from case to case. A prosecutor or defense attorney trying to assess the likelihood of a conviction has a limited number of elements to review.

153. See, e.g., Jeffrey M. Prottas & Alice A. Noble, *Use of Forensic DNA Evidence in Prosecutors’ Offices*, 35 J.L. MED. & ETHICS 310, 310 (2007) (noting that use of DNA evidence began in 1987 and by 2001, nearly seventy percent of prosecutors had first-hand experience using DNA evidence in a case); Julie A. Singer et al., *The Impact of DNA and Other Technology on the Criminal Justice System: Improvements and Complications*, 17 ALB. L.J. SCI. & TECH. 87, 101–02 (2007).

small relative to the entirety of the rest of civil litigation, and in a setting in which all criminal matters enjoy priority over all civil matters, noise-creating uncertainties are more likely to be laid to rest when they are related to criminal practice than when related to civil practice.

Despite its simplicity, criminal law may not be the most discrete area of law. Divorce practice, as Gilson and Mnookin suggest, may be even slightly more noise-free.¹⁵⁴

Fourth, as is the case with divorcing spouses, the average criminal defendant enjoys little control over his lawyer. Most “bread-and-butter” criminal cases are resolved quickly, sometimes on the day of arraignment. A private criminal lawyer needs to handle a great many cases per year to pay the bills,¹⁵⁵ and public defenders are swamped with cases, so they have incentives to plead out easily resolved cases as early as possible.

Considering these factors from the Gilson and Mnookin analysis, one would expect criminal law to be substantially more cooperative than corporate law, and similar to family law, though not quite as cooperative. Family law enjoys less noise, better reputation-making organizations, and more opportunities for value-creation than does criminal law.

B. Surveys and Criminal Law

While the Williams and Schneider surveys are exemplary works, the authors devote precious little separate attention to criminal law. Schneider’s 2006 work offers the most information. She gives breakdowns of the percentages of lawyers in each cluster by practice area.¹⁵⁶ The practice areas are family, civil, criminal, commercial,

154. Gilson & Mnookin, *supra* note 20, at 561–64.

155. A website run by the New York State Police indicates that lawyers’ fees for a typical DWI may run \$1,500. Division of State Police, New York State, The Costs of Drunk Driving, http://www.troopers.state.ny.us/Traffic_Safety/Drunk_Driving/Costs (last visited Sept. 14, 2007). I would expect that a trial could cost several times that much, but even if a defendant paid ten times the amount listed on the website, an attorney would need to have a half-dozen clients each year just to pay back law school debt. A second website, *costhelper.com*, indicates that a first-time drunk driving offense runs \$500–\$1,200 plus, a misdemeanor is \$2,000–\$4,000, while a felony could start at \$5,000 but go up to \$50,000. See *Costhelper.com*, Criminal Attorney Cost: How Much Does a Criminal Attorney Cost?, <http://www.costhelper.com/cost/finance/criminal-attorney.html> (last visited Oct. 3, 2007). A young attorney handling a caseload of mostly misdemeanors that result in plea bargains needs quite a few clients to pay law school loans, malpractice insurance, and the other non-trivial expenses associated with doing business as a lawyer.

156. See Schneider & Mills, *supra* note 9, at 616 tbl.4; see also *supra* notes 125–27 and accompanying text.

corporate, property, and other. The table is reproduced below:

Practice Area by Cluster¹⁵⁷

	<i>Family</i>	<i>Civil</i>	<i>Criminal</i>	<i>Commercial</i>	<i>Corporate</i>	<i>Property</i>	<i>Other</i>	<i>Total % by Cluster</i>
True Problem Solving	37.7%	36.4%	49.2%	38.2%	42.0%	44.7%	37.4%	39.3%
Cautious Problem Solving	23.0%	31.1%	22.0%	23.5%	34.0%	23.4%	25.3%	27.5%
Ethically Adversarial	24.6%	18.9%	20.3%	32.4%	22.0%	19.1%	23.2%	21.5%
Unethically Adversarial	14.8%	13.6%	8.5%	5.9%	2.0%	12.8%	14.1%	11.8%
Total % by Practice Area	10.6%	39.4%	10.2%	5.9%	8.7%	8.1%	17.1%	N = 578

Criminal lawyers are at the front of the pack for true problem solving, second for all problem solving—behind, of all groups, the corporate lawyers—and third from the bottom in unethical behavior.¹⁵⁸ These numbers form the profile of a very cooperative bar. The only attention given to this data in the family law article in which they appear incidentally is to note that “[i]n contrast [to family law], in criminal law with an equally small bar, the ‘repeat play’ seems to result in an amazingly high percentage (almost 50%) of lawyers on both sides who are true problem solvers.”¹⁵⁹

The Schneider survey was not intended to be an in-depth look into the workings of criminal law, and it does not offer conclusive evidence that all criminal practice is cooperative. But it is another strong data point that suggests that much criminal practice is cooperative, and it offers strong reason to conclude that the practice is cooperative relative

157. Schneider & Mills, *supra* note 9, at 616 tbl.4.

158. *Id.*

159. *Id.* at 618.

to other practice areas.

C. Bibas on Criminal Negotiations

Professor Stephanos Bibas has argued persuasively that criminal plea bargains occur for a variety of reasons that relate more to the structure of the environment in which negotiation occurs than to the expected value of the trial. His article, *Plea Bargaining Outside the Shadow of Trial*, is a masterful compendium of reasons why plea bargains occur and a mild excoriation of the school of thought that criminal defendants accept pleas based on a calculation of the expected value of their trials.¹⁶⁰

Bibas makes the claim that the expected value of trial is not a significant factor in plea decisions. He argues that decision tree analysis may be applicable to civil cases in which fine gradations of remedy can be perfectly indexed with fine gradations of potential culpability, so that a 74% chance of a \$200,000 win will be worth \$148,000. However, in a criminal case, a 10% chance of conviction on a fifty-year case cannot easily be turned into a five-year offer.¹⁶¹ Criminal law is, he argues, “lumpier” in its sentencing,¹⁶² and therefore in its bargaining. Bargains occur, not to minimize costs and not because participants know what will happen at trial, but for four other, less honorable reasons: The first of these is uncertainty, the second is money, the third is self-interest, and the fourth is demographic variation.¹⁶³

Uncertainty encompasses everything from lack of information to the human foibles associated with decision making in conditions of uncertainty. Bibas points out many associated psychological factors that

160. Bibas, *supra* note 22.

161. *Id.* at 2486–87. Bibas notes:

The theory of bargaining in the shadow of trial presupposes that parties can finely calibrate bargains to reflect slight gradations in probabilities. For example, if the chance of conviction drops from 100% to 95%, the prosecutor's offer would become about 5% sweeter. If the amount stolen from a bank rises from \$50,000 to \$51,000, the punishment would rise a little, as it presumably would after trial. These fine gradations would punish the worst defendants the most and would encourage prosecutors to focus on those who are most clearly guilty of the worst crimes. Under classic indeterminate sentencing, the parties could theoretically calibrate sentences in this way.

Id.

162. *Id.* at 2487 n.94.

163. *Id.* at 2464.

distort decision making, e.g., framing and prospect theory, and argues that in a practice with significant limitations on discovery, these distortions will impact lawyers and their clients.¹⁶⁴

Money is mostly about pay for attorneys—lawyers on both sides have financial or time-based incentives to settle cases through pleas. In addition, poor defendants cannot afford adequate investigation, and they may plead guilty for reasons more related to their inability to raise bail money than because they believe that the government could prove them guilty beyond a reasonable doubt.¹⁶⁵

Self-interest is partly about financial considerations parallel to those in the “money” section, but broadens to discuss reputational aspects of trial—it hurts to lose, whether you are an upwardly mobile prosecutor or a high-profile defense attorney.¹⁶⁶

Demographic variation is a discussion of how differences in immutable characteristics may manifest in plea bargaining. For example, people of type “A” may have a general proclivity to behave in a consistent way that allows exploitation by prosecutors, who may or may not be conscious of the effects. In such a case, if it could be shown that As tend to respond less well than others to harsh questioning, and harsh questioning is part and parcel of every trial, then a higher percentage of As will choose to avoid trial than will non-As. If the crime happens to be one in which the group happens to be overrepresented as defendants, the effects are doubly pernicious. In addition, these immutable characteristics may also map onto language inability, social discomfort, and inability to afford adequate representation.¹⁶⁷

Bibas’ conclusion is twofold. First, prosecutors cooperate with defense attorneys because they have a strong, shared interest in avoiding expensive and potentially reputation-damaging trials.¹⁶⁸ Second, in an under-funded system, there will inevitably be too little information on which to base an informed decision, and this lack of resources results in the kind of psychological distortions in defendants that can be manipulated to create fear of trial, and hence, plea bargains.¹⁶⁹

164. *Id.* at 2528–29.

165. *Id.* at 2529.

166. *See id.*

167. *See id.* at 2529–30.

168. *See id.* at 2546.

169. *See id.*

D. Birke on Incentives and Pressure

In 1999, I argued, in *Reconciling Loss Aversion and Guilty Pleas*, that defendants plead guilty in enormous numbers in large part because their lawyers responded to institutional incentives to distort the defendant's view of the expected value of trial and the associated discount.¹⁷⁰

My argument, when boiled down to essentials, goes something like this. There is a proven tendency to become risk-seeking when faced with a choice between a sure loss and a gamble that may result in either a large loss or no loss. This loss aversion is not overcome in plea bargaining; rather, it is the product of a lack of information. This lack of information comes not from a lack of information about the evidence or its strength, but rather because there is uncertainty about sentencing, jury nullification, lesser-included offenses, compromise verdicts, mitigating testimony, and the like. The fuzziness of information about the likely outcome of trial creates opportunity for defense counsel to present unnecessarily stark valuations about potential outcomes to their clients. The defense lawyers are responding to incentives in the form of pay, caseload, time, and relationships with court personnel when they pose questions calculated to induce pleas.

In many respects, my 1999 arguments are similar to those of Professor Bibas, although his argument is substantially broader and more thoroughgoing. Despite the differences in breadth, each of us argues that the environment in which criminal cases are processed in the United States includes a great many deviations from a utopian model in which pleas were based on a mix of perfect information about sentences and evidence, and in which resources existed such that sentences could be finely tuned to suit individual defendants and crimes.

E. Summary and Conclusion

The authors and works described so far are leading theories for cooperation in law. However, each of them fails, in my view, to fully recognize the pivotal role trial plays in the negotiation of pleas. Williams, Schneider, and Mnookin and Gilson focus on other aspects of the cooperation-competition question and leave the trial question largely untouched. And Professor Bibas' work is largely consonant with my prior work, in that we both argue that the prosecutor and defense attorney are influenced by factors exogenous to the defendants' guilt or

170. Birke, *supra* note 23, at 209.

the quality of the police investigation when determining disposition of cases.

However, here I part company with the other authors and attempt to extend my prior work. I believe that Gilson and Mnookin have underemphasized the role of trial—although they mention it in passing. Their focus is on how the private bar is structured and how an area of practice creates conditions conducive to cooperation or competition. They assume relatively infrequent trials and infrequent judicial contact. Williams and Schneider intended not to explain the sources of attorney behavior but rather to describe that behavior. Their surveys reveal quite a bit about who is cooperative and whether they are effective, but they do not attempt to answer why a lawyer cooperates or competes.

Professor Bibas has emphasized the non-trial influences on pleas in his work, in part because expected value calculations fail to produce a satisfying reference point for plea bargains. While I agree with him on this point, and while I accept and agree with his explanations for how non-trial influences distort plea bargaining, I believe that frequent trials facilitate cooperation by offering information that helps in price setting, by regulating negotiation behavior, and by providing an endpoint to negotiations. Lawyers may bargain outside the shadow of expected value, but they do not bargain outside the shadow of trial.

V. THE EFFECT OF TRIALS ON NEGOTIATION

A. *Criminal Trials—Rare, Frequent, and Jury-Waived*

Few people have seen a criminal trial, but everyone has a picture of one. There is a mythology surrounding criminal trials. This is unsurprising. Criminal trials are captivating. Trials are a form of high stakes performance art. They are morality plays with the natural drama of good versus evil. They are democracy in action—justice in the hands of citizens instead of government. They are sports-like—with offense, defense, rules, tactics, strategy, and quickness all on display, at least when counsel is good.

Criminal jury trials are overrepresented in the media. The media showcases criminal jury trials as adversarial contests in which there is no apparent cooperation between opposing parties. These trials are sometimes real and on Court TV, or fictional and on *Law and Order*. But no matter whether the trials are real or fictional, the ease with which they are brought to mind contributes to the prevalence of a mythology.

A natural result of the availability heuristic and the nature of media coverage is that people think jury trials are a primary way to resolve criminal cases.¹⁷¹ Trials occur frequently, and these trials are public and often the subject of television or newspaper reports. Criminal trials are not rare in an absolute sense, but they are relatively rare—rare relative to the number of cases processed by any busy prosecutor's office.¹⁷²

In addition, relatively few trials are jury trials. The majority of trials are jury-waived bench trials—more efficient¹⁷³ and less dramatic than the jury trial.¹⁷⁴ These bench trials tend to be less histrionic and overtly

171. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOLOGY 207, 230 (1973). Commentators agree. "Nothing is more central to the American vision of justice than the trial." Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 915 (2005).

172. My own experience as an assistant district attorney in Middlesex County, Massachusetts (1986–1991) is typical. In an office with several hundred lawyers, the newer prosecutors might have caseloads exceeding 300 and the more experienced prosecutors might have between ten and forty active cases. A junior prosecutor might complete one jury trial and two more bench trials in a busy week (sometimes more), but a busy week of pleas might end twenty misdemeanor cases and several more felonies. In addition, many cases are dismissed—adding to the number of matters handled, but not to the number of trials.

173. Jury trials take three times as long, on average, as bench trials. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 58 (2001). But see Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which Is Speedier?*, 79 JUDICATURE 176, 178 (1996) (finding longer time to disposition in nonjury than jury trials).

174. See, e.g., William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 817 (2006) ("Federal bench trials rose by 45% in the two years after *Apprendi* was decided, and that was before litigants even knew whether *Apprendi* applied to federal sentencing. Since the number of federal criminal trials remained constant, a rise in bench trials meant a decline in the number of jury trials . . .") (citation omitted).

In one study, the percentage of cases (criminal and civil) tried to judges was twenty-five times higher than the percentage tried to a jury—15.2% compared with 0.6% of all dispositions. See Fairchild & Thompson, *supra* note 116, at 19–20 (citing to NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2004: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 22 (Richard Y. Schauffler et al. eds., 2005)), available at http://www.ncsconline.org/d_research/csp/2004_files/EWCivil_final_2.pdf [hereinafter NCSC, A NATIONAL PERSPECTIVE]. They are to be preferred for good reason. The conviction rates in criminal jury trials tend to run at about eighty percent, while the conviction rate for bench trials is closer to fifty percent. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 141 (2002); Jason Krause, *Judge v. Jury*, A.B.A. J., June 2007, at 46, 47.

This comports with my experience. Judges are much less likely to be overwhelmed by prejudicial evidence. For example, in a trial for possession with intent to distribute cocaine, a juror who sees, for the first time, a large quantity of cocaine found in a defendant's home is likely to be shocked by the quantity of drugs, and less likely than a judge to consider exculpatory information, like police misconduct during a search. Drunk driving cases in which the defendant was very intoxicated but there is an allegation that the breath test was flawed are similar. There are simply many crimes with facts that are, for laypeople, stomach-

adversarial than jury trials in which jurors' emotions and sympathy are mixed with fact-finding.

Bench trials increase the power in the hands of the judge. While judges' discretion in many areas has been curtailed—sentencing, to name a prominent example—judges still enjoy wide latitude in the conduct of trial, including matters related to admission and exclusion of evidence, matters related to jury instruction, and within constraints, matters related to sentencing as well. When the judge is the finder of fact, his power over the conduct of the trial is total, and his impact on the outcome is significant.¹⁷⁵ Appellate opinions confirming judicial use of discretion in the conduct of trial are common.¹⁷⁶

How does this wide discretion impact criminal practice? There is no easy empirical answer to this question, but my experience as a prosecutor was characterized by pleas that were made with substantial

turning. One of the incidental effects of working every day in such a system is the dulling of the senses. Judges (and prosecutors and defense attorneys and police) are much less easily shocked. For some statistics on the ratios of bench to jury trials in various states, see Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 10–11 (1995).

175. “Judges must remember that lawyers, jurors, and witnesses all take their cues from the judge. If judges send the right signals, they are more likely to get a respectful response.” Paul L. Friedman, *Taking the High Road: Civility, Judicial Independence and the Rule of Law*, 58 N.Y.U. ANN. SURV. AM. L. 187, 196 (2001); Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1278 (1975).

176. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 418–19 (2007) (“At the other extreme, certain decisions—most often those relating to the management of the litigation at the trial level—are reviewed under a highly deferential ‘abuse of discretion’ standard. Under this standard, the trial court’s decisions are not wholly insulated from review; however, the appellate court should not reverse merely because it would have decided the issue differently. According to one classic formulation of the ‘abuse of discretion’ standard, a trial court decision ‘cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.’”) (citing *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954)); Timothy J. Storm, *To Appeal or Not to Appeal: Practical Counseling for the Client Considering an Appeal*, 19 DUPAGE COUNTY B. ASSOC. BRIEF, Feb. 2007, at 12, 15 (“[T]he average affirmance rate for issues decided under the least deferential, *de novo*, standard of review stands at about 55%; for the clear error and manifest weight of the evidence standards, the affirmance rate is over 75%; and where the most deferential abuse of discretion standard is used, the affirmance rate is well over 90%.”); William A. Woodruff, *The Admissibility of Expert Testimony in North Carolina after Howerton: Reconciling the Ruling with the Rules of Evidence*, 28 CAMPBELL L. REV. 1, 54 & n.338 (2005) (“One analysis of affirmance rates throughout the federal system since 2000 put the affirmance rate for cases excluding expert testimony at 84.9%, the affirmance rate for cases admitting expert testimony at 88.3%, for a total affirmance rate of 86.8%.”) (noting that the abuse of discretion standard in such cases results in a very high rate of affirmance). See generally Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002).

clarity about the likely outcome of trial—because those with whom I bargained understood judicial proclivities—that wide range of behavior that would be scrutinized by appellate courts only for abuse of discretion. I have engaged in dozens of conversations over the past fifteen years with prosecutors and defense counsel from all over the country, at all levels of practice, and they corroborate my experience—knowing the judge makes a huge difference in bargaining, active judges control attorney behavior, and speedy trial deadlines provoke serious bargaining. I turn now to these topics.

B. Setting Prices

Trials help set prices in three ways. They offer information about market value, they occur frequently enough that market information is current and updated often, and the information is disseminated easily and widely.

1. Expected Value Does Not Matter—Market Value Is the Key

Professor Bibas argues that expected value is not strictly applicable to criminal cases and that many factors unrelated to probability of conviction or likely sentence influence the bargaining process.¹⁷⁷ I agree. However, trial judges control the manner and often the outcome of trials. Understanding the proclivities of a trial judge helps a criminal lawyer understand how strong one's case is, and how the judge will sentence within whatever restrictions may exist. To the extent that an individual judge's courtroom is akin to a retail establishment, so is the bargaining. In a Ford dealership, the stated price is flexible. In a Saturn dealership, it is not. So too, are some judges of a mind to let all evidence in, while others exclude more. Expected value is independent of who happens to be selling. Market price depends on the market in which one finds himself or herself.

Professor Bibas argues further that lumpy steps between sentences and sentencing guidelines make expected value a difficult tool to use in plea bargaining.¹⁷⁸ I agree again, but I differ with him on the effect of stair-step graduated sentences. Stair steps might make refined bargaining difficult—a prosecutor cannot lower a sentence offer in precise proportion to a diminution in probability of conviction—but the typical plea bargain is negotiated in terms of months and years, not in

177. Bibas, *supra* note 22, at 2545.

178. *Id.* at 2487.

days. Stair-step sentencing makes bargaining easier, in that there are situations not near a cusp—and in which there is no ambiguity about expected sentences—and situations near a cusp, in which it is vitally important to understand what a particular judge will do when deciding a case on a cusp line. Will a given set of facts yield a burglary conviction, or will the facts only support the lesser charge of breaking and entering? The sentencing step between these two charges may be stark, and while a lack of knowledge about which charge will be supported might make bargaining difficult, once one understands the proclivities of the trial judge well enough to predict her decision about which charge will be supported, bargaining becomes simple. Knowing which side of a clear line a judge stands on makes sentencing simpler, and the job of a prosecutor or defense attorney in price-setting is easier than in a system with infinite sentencing gradations.

2. Frequent Trials Yield Adequate and Current Supplies of Information

Information about trials flows smoothly and constantly through every local court system. Trials are frequent and they are observed by court officers, lawyers, clerks, and other people who collectively create an institutional library of memories about particular judicial tendencies. A lawyer need not speculate about what a judge might do in a trial when he can observe that judge in a similar circumstance. A few days in court and a few conversations with local practitioners and courthouse staff will reveal to a new ADA or defense attorney that Judge X will allow certain evidence in over a hearsay objection and Judge Y will not.¹⁷⁹

The important predictive questions in criminal law cases are less about the range of outcomes—which tend to be highly restricted and well known—and more about what evidence is admissible and which judge will preside over one's case. Once these matters are known, lawyers and others in the community know or can learn the “going rates.”¹⁸⁰

179. Or that X punishes home invasions harshly and Y is more lenient. Or that X will more freely allow expert testimony than Y. Or that X is less willing than Y to allow motions to suppress. The list offered is a small and incomplete set of examples offered as illustrations of the kinds of information that is needed to craft a prediction of trial outcomes, and which is readily learned by prosecutors and defense attorneys working in local courts.

180. When dealing with a new defense attorney, I would bolster the credibility of my offer by framing a question and directing the new attorney to a credible source for an answer. For example, I might say “in a case with facts 1, 2, and 3, and a defendant with a prior record of A, B, and C, what will Judge X do? I suggest he would do X, Y, and Z, but you do not have to take my word on it. Ask any handy public defender, the court officer, or the clerk.

The frequency of criminal trials allows for verdicts and decisions in the kinds of cases that guide the negotiation practices of the community of lawyers. If no one knows whether Judge X will label certain actions burglary or breaking and entering, it is likely that a prosecutor seeking a burglary conviction will encounter a defense lawyer who aspires to reduce the charge to breaking and entering. These litigators are unlikely to agree on a sentence until they have some clarity about the judge. If they knew that X would find burglary, they would bargain accordingly. If they knew X would find only breaking and entering, they would similarly bargain in that shadow. And if they do not know, they are likely to try to find out what X would do. (And sometimes X will tip his hand publicly just to facilitate bargaining.) If there is no ready answer that can be found, the case will be unlikely to settle and a trial will occur. Thereafter, X's proclivity has been exposed and the trial has produced new information about Judge X—a community asset that will be added to the library of information about bargaining and sentencing in X's courtroom.

Finally, in criminal law, most cases are small. Simple, repeat, “bread-and-butter” cases are much more common than complex cases. In a busy courthouse, an observer could learn 100 variations of a simple drug transaction or an operating-under-the-influence case in a short time. The first court date after a long, July 4th weekend would provide ample opportunity to see a substantial slice of all criminal law has to offer. Thus, market price-setting in common cases occurs frequently.

3. Dissimilar Cases Yield Valuable Information, as Do Third Party Reports

One need not have a similar case to get an important question answered. For example, in a burglary prosecution where there was a question about whether a past bad act would be allowed to be used for some other reason than for showing a pattern of behavior, Judge X's response to this same question in a drug trial is as relevant as it would be in the burglary trial. Judges try enough cases that they deal often with evidentiary questions and with most common sentencing issues.

Furthermore, one need not actually witness a judge making a

They will tell you the same thing.” And they would. The defense attorneys would ask, and they would get the same answer I gave. Not because I was persuasive—rather, because I was awake during the many chances I had to watch Judge X conduct trials and take pleas. The going rates were well established, and most everyone knew them or could figure them out in a hurry.

decision to learn about her proclivities. Her reputation is likely to be well known. Criminal law tends to be a local practice, and judges are highly visible figures. Judicial proclivities become a public commodity to all in the community, not just to direct observers.

4. The Right Cases

When defense counsel and prosecutors see cases the same way, they have every reason to settle. Time, efficiency, risk aversion, and other factors create the well-understood pull toward the plea.¹⁸¹

In some instances in which the adversaries see the case similarly, the case may still proceed to trial—perhaps because a prosecutor cannot dismiss a loser of a case because of political reasons,¹⁸² because a defendant with private counsel refuses to face reality, or some other such reason—but these cases are a relative minority.¹⁸³ Judges may lament that they would like to try more cases, but these same judges are often impatient with cases that were tried for no good reason—worthier trials wait in the wings. Some of this impatience manifests itself in evidentiary rulings, tone of voice, and perhaps in sentences. There is certainly a reputation cost for being known as someone who wastes a court's time.

In most instances, trials occur because the prosecutor and defense attorney have a difference of opinion about the likelihood of conviction—and these differences are based primarily on an understanding of whether evidence will be admitted, how much weight

181. See Bibas, *supra* note 22, at 2546; Birke, *supra* note 23, at 233, 238–41.

182. See, e.g., *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1295 (Mass. 1984) (discussed in Kelly Mahon Tullier, Note, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 885–86 (1992)). In the *Ware* case, the police officers stopped a driver who appeared to be intoxicated, but the officer declined to make an arrest. 467 N.E.2d at 1295. The driver shortly thereafter crashed into and killed Misty Jane Irwin. *Id.* The Irwin family successfully sued the municipality that employed the officer and received an award of approximately \$873,000—a substantial sum in any day, but an enormous sum in 1977, especially to a small town's budget. *Id.* This case caused many a police department to tighten up its policies regarding protective custody and arrest. In addition, the creation of Mothers Against Drunk Driving in 1980 had an enormous impact on the public consciousness about drunk driving. See Laurie Davies, *Mothers Against Drunk Driving*, 25 *Years of Saving Lives*, DRIVEN, Fall 2005, at 8, 8–17. While it is impossible to single out a particular change agent, it is certain that the 1950s era attitude that one could have a few “harmless drinks” at the office Christmas party and then drive home was no longer an acceptable strategy for police or prosecutors.

183. See, e.g., Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1444 (2007) (“[E]xperience suggests that these disputes—particularly if they are of constitutional dimension—are relatively rare, if for no other reason than that people tend not to litigate cases with obvious answers.”) (citations omitted).

it will be accorded, and the legal significance attached to that evidence. Some of these factors are taken out of the judge's hands in a jury trial, but even there, a lack of understanding about how a judge is likely to exercise discretion acts as a cloud of uncertainty over the negotiations. Increased information about an individual judge's use of discretion in matters related to evidence, jury instructions, and sentencing make trial outcomes more predictable, and a great many cases settle for the common understanding of the going price.¹⁸⁴

However, if Priest and Klein's simple explanation is right—that cases settle when expectations about trial outcomes converge—the right information must be available.

Judges may make a lot of rulings, but there is no guarantee that they will have the chance to speak about matters relevant to the practicing bar. The market value of judicial information is vibrant only if the judges address the right questions.

Only about three percent of all criminal cases are tried.¹⁸⁵ While this is a historically low trial rate, criminal caseloads are at all-time highs. Every judge has ample opportunity to deal with run-of-the-mill cases and questions. A new judge will be quickly understood by the bar as she will be exposed to the same questions that have long existed in criminal practice.

Novel questions are a rare commodity. New questions percolate quickly to the attention of everyone in the legal community—e.g., when a new law is passed or when a novel argument is raised. If a judge wants to rule on a novel question, she has ways of tipping her hand. Frequent contact with judges gives prosecutors and defenders insights into judicial philosophies, and judges use their contact with attorneys to send messages to the practicing bar. Every criminal defender is looking for a new way to exculpate her clients, and every prosecuting attorney wants to seal a legal loophole or gain bargaining advantage, so with ample numbers of criminal cases flowing across their desks, the lawyers have ample opportunities and incentives to try cases presenting novel questions. However, once the uncertainty is resolved, the novelty and incentive evaporates, leaving room for the next new question.

The civil system, at least the one described by Gilson and Mnookin,

184. See Blanca Fromm, Comment, *Bringing Settlement out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 669–70 (2001) (lamenting the passage of the time when verdicts were sufficiently plentiful to act as meaningful reference points).

185. See Galanter, *supra* note 6, at 512 tbl.7.

stands in stark contrast to the criminal system. In civil litigation, lawyers and their clients file and maintain lawsuits for reasons that have nothing to do with the underlying merits. They may settle eventually, but only after years, whereas nearly all criminal cases are completed within a year of arrest—and most in half that time.¹⁸⁶ The civil cases that go to trial may be of little informational value to the general community of litigators and only passing, non-appellate importance to those who labor in the same practice area as the subject of the trial.¹⁸⁷ Civil trials are simply not numerous enough or frequent enough relative to the number of practice areas for judicial proclivity to be the most significant unknown factor in a case, whereas in criminal law, questions about the manner and conduct of trial are usually more uncertain than the state of the law.

C. Regulating Behavior

Where most interactions between civil lawyers occur in private offices, criminal law is mostly practiced in court. Many prosecutors' offices are in courthouses, and if not in the courthouse, they tend to be nearby. Prosecutors spend much of their day in or near the courthouse, so if an attorney wants to find a prosecutor to discuss a case with him, she may have to go find him as he is waiting for a trial or a hearing or another event. Negotiations occur on arraignment day, on status conference days, on days when prosecutors and defense attorneys see each other on other cases, and right up to the day of trial. Plea bargaining often happens in court.

"In court" often means in front of a judge—or nearby.¹⁸⁸ And

186. NCSC, A NATIONAL PERSPECTIVE, *supra* note 173, at 22.

187. In appellate law, arguably the most visible kind of law—nearly every law book is a "case" book, and the U.S. Supreme Court captures a great deal of attention whenever it acts—judges are able to avoid answering questions by means of any number of procedural devices. Indeed, they are encouraged to answer minimally by a legal culture that purports to abhor rampant judicial activism. There is a great deal of information about the U.S. Supreme Court, but it is not the kind of information that would allow accurate prognostication about the likelihood that a given justice would rule in one's favor on any given point. The justices rule on questions that are interesting to them—and only on those questions. In contrast, criminal trial court judges rule on questions of interest to counsel, often made interesting precisely because of uncertainty about judicial proclivity.

188. See Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 739 n.88 (2003) ("The Administrative Office explains the system: 'As indicated by the weighting system, the typical criminal action makes more demands on a judge's time than does the average civil matter. Criminal cases generally consume more time because they require greater involvement by judges and are more likely to go to trial (five percent of criminal felony defendants went to trial compared to two

appearing in front of a judge imposes a higher standard of behavior than when meeting outside the presence of a judge with opposing counsel. Even the ethical rules require more strict adherence to higher standards when one is before the tribunal (the highest expectations)¹⁸⁹ than when bargaining with opposing counsel (the lowest expectations—"puffing" and "bluffing" are explicitly allowed).¹⁹⁰ The frequent contact attorneys have with judges allows a lawyer to expose publicly an opponent who is negotiating outside the bounds of local norms. A judge who hopes to act as an effective case manager¹⁹¹ and who is alerted to a "defector" can quickly coerce the non-complier into compliance.

Lawyers learn not to anger judges, because judges talk to clerks and the clerks talk to the court officers and soon everyone knows that "attorney A is in X's doghouse." A's success depends on the ability to get along with the institutional staff at the court, and A knows that if he fails to play nice, there will be public repercussions. An angry judge can effectuate subtle but significant retaliation.

Similarly, any lawyer who hopes to practice effectively in a community negotiates in a way that preserves reputation with the judge's many minions—clerks, court officers, guards, and the like. Judges are treated like kings and queens of the court, if not with luxury, at least with respect and deference. A slur or discourtesy inflicted toward or in the presence of a high-ranking minion will result in a diminution of one's reputation with the ruling family. So too, will behavior that angers a long-term clerk be made known to judges for whom that clerk works. Thus, the judge's shadow does extend outside the courtroom into the rest of the courthouse.

In addition, there is reason to believe that the busier and faster-moving the court, the more important the role of the judge in norm-setting. In a study of nine criminal courts, the National Center for State Courts found that "more expeditious courts are most conducive to

percent of civil cases).") (citing ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2001 at 25–26, <http://www.uscourts.gov/judbus2001/front/2001artext.pdf>).

189. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2006) ("Candor Toward the Tribunal").

190. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006) ("Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' ordinarily are not considered 'false statements of material fact' within the meaning of the Model Rules.").

191. See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–80 (1982).

effective advocacy. Attorneys in . . . expeditious courts were much more likely to believe that . . . the court promulgated clear and decisive policies on case resolution”¹⁹²

Esteemed social scientist Jon Elster observed that people negotiate differently in public than in private.¹⁹³ In private, they make deals, and in public, they stand on principle. The ability to take a private bargainer who is playing unfair and turn his behavior into fodder for public consumption offers the chance to make the unscrupulous negotiator negotiate in a principled way—negotiate fairly or be exposed.

In this way, the demand that lawyers appear regularly before judges to report the status of cases bound for trial—and until they turn into pleas, all cases are bound for trial—acts as a strong governor of negotiation behavior.

This idea is corroborated by Professors Gilson and Mnookin, who note in passing that “in contexts in which cooperation is not only observable but verifiable to a judge, the judiciary may represent a powerful mechanism to insure cooperation.”¹⁹⁴

D. Forced Finality

Once I was asked to give a talk on why cases do not settle. I replied that cases do settle—they just settle late. The idea of “settlement on the courthouse steps” is a familiar one. There are many theories about why cases settle late, but chief among these are that information needs to be developed, that attorneys have little incentive to settle early, and that settlement occurs only when one of the overconfident litigants is about to be proved wrong about his predictions of the likelihood of winning.

Short timelines to trial means that every criminal case starts closer to trial than nearly any civil case. A criminal case that takes more than a year from arrest to trial is unusually long.¹⁹⁵ Many criminal trials occur

192. BRIAN J. OSTROM & ROGER A. HANSON, EFFICIENCY, TIMELINESS, AND QUALITY: A NEW PERSPECTIVE FROM NINE STATE CRIMINAL TRIAL COURTS, at XVIII (1999), available at http://www.ncsconline.org/WC/Publications/Res_CasMan_EfficiencyPub.pdf.

193. See Jon Elster, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION, 237, 251–52 (Kenneth J. Arrow et al. eds., 1995).

194. Gilson & Mnookin, *supra* note 20, at 565.

195. See, e.g., *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (observing that for purposes of the constitutional speedy trial right “lower courts have generally found postaccusation delay ‘presumptively prejudicial’ at least as it approaches one year”). This one-year rule can be found in most states. See, e.g., IND. R. CRIM. P. 4(C) (“No person shall be held . . . to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge . . . is filed, or from the date of his arrest on such

within a few months of an arrest.¹⁹⁶ In contrast, many civil cases linger on dockets for years and years, and virtually none are tried within a few months of filing.¹⁹⁷

The ability of either side in a criminal case to “call the bluff” acts as yet one more incentive for lawyers to work together to determine whether a triable controversy exists. The threat of a speedy trial has a preventative effect on attorneys’ willingness to use the hard bargaining tactics of bluffing or stonewalling.¹⁹⁸

charge, whichever is later”); *Divver v. State*, 739 A.2d 71, 78 (Md. 1999) (finding that a delay of one year and sixteen days, resulting from the State’s negligence in scheduling the defendant’s trial, violated the defendant’s right to a speedy trial); *Shaw v. State*, 117 S.W.3d 883, 889 (Tex. Crim. App. 2003) (citing *Doggett*, 505 U.S. at 652 n.1). In Indiana, if a summons is issued in lieu of an arrest warrant, the speedy trial clock of Criminal Rule 4(C) starts on the day the summons orders the defendant to appear in court. See *Johnson v. State*, 708 N.E.2d 912, 915 (Ind. Ct. App. 1999), *transfer denied*, 714 N.E.2d 177 (Ind. 1999).

196. In one remarkable study, the average time from arraignment to disposition was fifty-one days, with a median of thirty-four days. Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 264 (2000). While this may be atypical, it is suggestive of the speed with which criminal cases sometimes move.

197. For an example of how slow civil courts can be, see David H. Becker, *The Challenges of Dam Removal: The History and Lessons of the Condit Dam and Potential Threats from the 2005 Federal Power Act Amendments*, 36 ENVTL. L. 811, 855 (2006), noting that “a three-month time frame for a trial-type hearing is fanciful, given the reality of contemporary administrative and civil judicial adjudication in which two to five years is typical for the resolution of disputed issues of fact through discovery and trial.” See also *id.* at 855 n.286 (“See, e.g., 2004 DIR. OF THE ADMIN. OFFICE OF THE U.S. CTS. ANN. REP. app. 1, tbl. C-5 (showing 21.9 month average time from filing to disposition after trial of cases in federal district courts); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 373 n.151[, 400] (2002) (citing studies showing that in 1988, the National Labor Relations Board took an average of 762 days to adjudicate an unfair labor practice charge and that the median for civil trials between the filing of the complaint and the beginning of trial was 2.5 years); John Burritt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 HOFSTRA L. REV. 865, 884 (1996) (citing studies of [Los Angeles County] state civil courts in which the average case took up to 59 months from filing to trial).”).

For a view of one state court’s ability to deal with civil cases, see Suzanne J. Schmitz, *Practical Lessons from the First Circuit Mediation Program*, 94 ILL. B.J. 30, 33 (2006) (“The [Illinois] first circuit’s docket is low, with about 12,000 cases filed annually, and an average time to disposition for major civil cases being 26 months.”) (citing ADMIN. OFFICE OF THE ILL. COURTS, ANNUAL REPORT OF THE ILL. COURTS: STATISTICAL SUMMARY 2004, 4–6, 16–17 (2004), <http://www.state.il.us/court/SupremeCourt/AnnualReport/2004/StatsSumm/pdf/2004StatsSumm.pdf>).

198. For a background discussion of stonewalling in bargaining, see David C. Croson & Robert H. Mnookin, *Scaling the Stonewall: Retaining Lawyers to Bolster Credibility*, 1 HARV. NEGOT. L. REV. 65 (1996). While there was nothing discussing stonewalling in criminal law at any length, for a mention and short discussion of the choice to stonewall or not in criminal law, see William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 763 (1989).

In rough fashion, I have outlined three ways in which the steady supply of criminal trials facilitates rapid settlements in most criminal cases. I have argued that these settlements are high-quality settlements in that they are calibrated reasonably well to expected trial outcomes, and that a consistent effect of increased judicial conduct is a desirable increase in the propagation of norms of cooperation. But even if it is true that frequent, readily available trials increase cooperation in criminal law, are the lessons necessarily limited?

VI. IS CRIMINAL LAW UNIQUE? ARE THE LESSONS TRANSPORTABLE?

If my thesis is correct, that criminal practice is cooperative because there is frequent contact with the court and because trials occur frequently, a next logical step might be to wonder whether the same levels of cooperation would emerge if there were more trials in other arenas. Such an inquiry is beyond the scope of this article. Moreover, I am inclined to believe that there is no definitive answer to this question, but I hope I will be proved wrong. Until such proof emerges, let me offer a few thoughts on the matter.

A. Possibility One: Criminal Law Is Unique and the Lessons Are Not Transportable

Criminal law is unique in many respects, but there are three aspects to criminal law that bear on our inquiry. First, there is no civil analogue for the “Speedy Trial Rule” and courts can let civil cases linger longer than criminal cases. Courts sometimes enact presumptive disposition timelines, and some are better than others at living up to those timelines, but the timelines do not produce mandatory dismissals in the way that the Speedy Trial Rule sometimes does. Judges overseeing civil cases carry a much smaller stick—their threats to civil litigants to move expeditiously are less potent than the threat to a prosecutor that a case will be dismissed for failure to expedite.

The second unique aspect of criminal law is that criminal cases start through involuntary participation. Criminals do not want to be in court, and they have no choice to be in court once a case starts. With the exception of federal prosecutors, it is the police, not the lawyers, who start cases.¹⁹⁹ Prosecutors react to cases the police bring in through

199. Federal prosecutors are proactive whereas state prosecutors are reactive. Federal prosecutors may choose to prosecute only those cases that they want to. Important questions about judicial proclivities may not ever come before a judge because the prosecutors may not

arrests. The wide net of local police work sweeps into the criminal court many participants who want to exit the system at the earliest possible moment. As a result of the Speedy Trial Rule and statutes that prioritize criminal cases over civil cases, many defendants who were brought in involuntarily are doing whatever it takes to end their cases. In contrast, in civil law, at least one party has chosen to commence a lawsuit and that party can maintain the lawsuit as long as it serves its interests.

Civil law is, arguably, a consent system. The parties are free to settle at any time. Pretrial proceedings occur outside the purview of the court. It may be substantially harder to force cases to trial in a consent system.

The third aspect of criminal law that is different from civil law is the uniformity of the cases. Civil law varies substantially more widely than does criminal law, running, as it does, from antitrust to admiralty to administrative law to animal law. A civil (divorce) case may have little to do with any other civil case, and a verdict in a random civil case may have little value to other civil (non-family law) litigators. A criminal case of any stripe has a fair amount of overlap with every other criminal case and the lessons extrapolated from a trial are more easily transported from one case to another.

Finally, to the extent that privacy is an oft-touted benefit of settlement, price-setting in civil cases becomes more difficult. With few verdicts, and many of those verdicts emerging from cases that may not involve important questions for the bar, cases settle because transaction costs threaten to overwhelm the gap between offers.

In sum, because civil law involves willing litigants, disempowered judges, a myriad of practice areas, and confidentiality, it may be reasonable to conclude that there is little that criminal trials have to offer the would-be reformer of the civil system.

B. Possibility Two: Criminal Law Is Not Significantly Different

If trials were cheap, quick, and readily available in all civil cases, lawyers in those civil cases would find their environment sufficiently similar to the one in which criminal lawyers operate that they would

deliver up an appropriate test case. In local prosecutors' offices, the prosecuting attorney has little choice but to prosecute whomever the police arrested the night before. Judges in state courts oversee a larger, more random selection of crime.

In addition, federal judges try fewer cases, so less information about their proclivities is available. Federal cases last longer and tend to be more complex than state cases. Noise and ambiguity are greater than in state court. Federal judges are constrained by sentencing guidelines. State judges, by and large, enjoy more discretion.

start to cooperate in similar fashion. However, outside of criminal law, trial has become less likely and more expensive.²⁰⁰ If this trend were reversed, there might be a commensurate increase in cooperative behavior. Following Jon Elster's argument,²⁰¹ it may be the case that the private negotiations that occur between civil litigants are far nastier than the semi-public negotiations held between criminal lawyers. Were the civil litigators hailed more frequently into court for a public monitoring of their negotiations, the negotiations might increase in civility.

This idea is corroborated by the decline in cooperation in family law noted by Professor Schneider, which may be explained by the introduction of mandatory mediation programs in domestic relations courts.²⁰² The attenuation of the link between filing a case and getting in front of a judge may have contributed to a decline in civility in negotiation. Mandatory mediation has had the effect of delaying the time until disputing parties can get in front of a judge. Surely any delay would result in some trials getting dropped because of expense or time. Certainly some cases settle in mediation as a result of mediator skill or pressure. Then the number of cases that go to trial is smaller, and the aggregated likelihood that any case will go before a judge is smaller. As more obstacles stand between a litigant and a judge, the negotiation behavior becomes increasingly private—and less civil.

Criminal law may be no different than civil law because base-rate data²⁰³ and reference points matter in all settlements. Nobel Laureate

200. In *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, Patrick E. Longan makes the point that deadlines and time limits would provoke both settlements and trials, which would provide information leading to better settlements.

Alternative dispute resolution thus is not a substitute for adjudication. It can assist the parties with breakdowns in negotiation that arise for other reasons, but it cannot provide the information or the impetus that trials, and the looming prospect of trials, provide. There is no substitute. It is unlikely that the amount of civil trial time will expand in the near future; however, there may be room for more efficiency in the way that time is used.

35 ARIZ. L. REV. 663, 695 (1993).

201. See Elster, *supra* note 193, at 251–52.

202. See generally Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 J. FAM. L. 491 (1993–1994).

203. Base-rate ignorance is the notion that particularly salient aspects of a fact pattern may cause a decision maker to conclude that a given result is unusually likely (or unlikely) because they are overenchanted with the salient fact and ignorant of the true base rate. See generally Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973). A simple example of this goes as follows: If Joe is bookish, and loves

Thomas Schelling noted that agreement occurs where focal points are made prominent.²⁰⁴ In this regard, civil cases are no different than criminal cases. If matters of judicial discretion were made predictable, civil cases would be more likely to settle in anticipation of anticipated trial outcomes, instead of settling because of transaction costs and other externalities.

A federal judge recently remarked at a symposium at my law school that too few cases are tried.²⁰⁵ He indicated that as many as ten percent of cases ought to be tried, so as to increase public participation and to send messages to the public and the bar about how much certain cases might be worth.²⁰⁶ His lament was two-fold—one, that too few cases were tried, and two, that the cases tried were not necessarily the cases that needed to be tried. He hoped for more trials, but he also wanted to pick them²⁰⁷ presumably because if he could choose the “right” cases, he would pick the ones with the largest expected information value.

Criminal law is no different than any other practice because deadlines generally have an impact on settlement.²⁰⁸ If judges could more effectively herd civil cases toward speedy trials, they might be able to sort out cases that are never bound for trial, but are stuck in litigation.²⁰⁹

Finally, there is no reason to believe that norm-setting for the practicing bar is any different for civil practitioners than for criminal practitioners. New lawyers would do well to learn to ply the litigation trade publicly, in the presence of experienced members of the community. If the bar wants to inculcate good values in its membership, it ought to have the most prominent members of the profession—the judges—act as teachers. If more lawyers spent more time in front of more judges, practice norms would be more likely to be more oriented toward cooperation.

reading, and hates to travel, and likes peace and quiet, is it more likely that Joe is a librarian or a salesman? The likely response is that Joe is a librarian, but this is probably wrong. If 100% of librarians fit this description and only 1% of salesmen fit, it is still more likely than Joe is a salesman, because the ratio of salesmen to librarians probably exceeds 100 to 1.

204. For a thorough (and Nobel-prize winning) discussion on focal points and their use in dispute resolution, see THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57–59 (1960).

205. Remarks of Federal Judge Ed Leavey (on file with author, and to be published in a forthcoming issue of *Willamette Journal of International Law and Dispute Resolution*).

206. *Id.*

207. *Id.*

208. See Robert B. Cialdini, *INFLUENCE*, 229–60 (1984).

209. See *supra* Part VI.A.

VII. CONCLUSION

Is more cooperation a good thing? Perhaps not. A cooperative criminal bar may mask a broken justice system. The criminal justice system is woefully underfunded and lacks a coherent jurisprudence. The ratio of pleas to trials may be out of sync with constitutional mandates and public norms associated with crime. If every defendant is “innocent until proven guilty,” plea bargains may be problems, and cooperative negotiations may be evidence of something wrong.

Nonetheless, to the extent that one holds the value that cooperation between and among lawyers is a good thing, I stand by my argument that quick and frequent trials have the effect of creating cooperation among lawyers. Trials certainly contributed mightily to the cooperative regime in which I practiced, and stories I have been told by other prosecutors confirm my experience.

I am loathe to extrapolate too far. Federal criminal practice may be different enough for the lessons from state practice to apply. So may civil cases be different enough from criminal that lessons from criminal law do not apply.

However, I am equally loathe to extrapolate too little. It appears that the ratio between verdicts and pleas in criminal law represents a symbiosis adequate to make criminal law among the most cooperative areas of practice. If legislatures would create a judiciary adequately sized to force civil litigants to adhere to the same timelines as state prosecutors, and if the judiciary rode herd on civil cases with the same attention that they give to criminal cases, I believe that more of the right cases would be tried, more lawyers would learn to negotiate cooperatively, and those involved in the legal system as litigators and litigants would benefit.

* * *